

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**HAROLD B. WOLFE and  
LUTHER ELLISON,**

**Plaintiffs/Petitioners,**

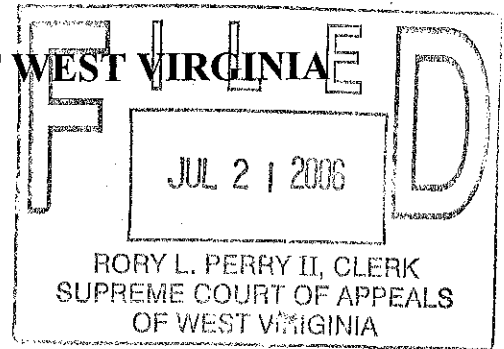
**v.**

**No. 33093**

**VIPS ALIPZAR,**

**Defendant/Respondent.**

**APPEAL FROM THE CIRCUIT COURT OF  
MONROE COUNTY, WEST VIRGINIA  
MONROE COUNTY CIVIL ACTION NO. 04-C-94**



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**DEFENDANT/RESPONDENT'S REPLY BRIEF**

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## **DEFENDANT/RESPONDENT'S REPLY BRIEF**

### **I. STATEMENT OF THE CASE**

Plaintiff/Petitioners, Harold B. Wolfe and Luther Ellison (hereinafter "Petitioners"), have petitioned this Court to hear an appeal from the Order Granting Defendant's Motion for Summary Judgment, entered on August 26, 2005, by the Circuit Court of Monroe County. Petitioners assert that the Circuit Court erred in granting Defendant/Respondent, Vips Alipzar's (hereinafter "Respondent"), Motion for Summary Judgment, in that disputed issues of material fact exist which preclude entry of the same. Respondent asserts that the Circuit Court's August 26, 2005 ruling is not in error in that, as a matter of law, Petitioners failed to present any evidence that they are entitled to the relief sought in their pleadings.

### **II. BRIEF STATEMENT OF FACTS**

On or about November 28, 2001, Respondent became the record owner of the real property at dispute in this action, more particularly described and of record in the Office of the County Commission of Monroe County, West Virginia, in Deed Book 228 at page 168. Respondent purchased said property subject to a 30' deeded right of way easement in favor of Petitioners, which easement encompasses a ford across Turkey Creek. At the time Respondent purchased the subject property, there existed thereon a bridge over Turkey Creek at a location north of the above described deeded easement. Moreover, at the time Respondent purchased the subject property, there was no deed or other writing on record in the Office of the County Commission of Monroe County, West Virginia, indicating that anyone other than Respondent's predecessor in title had any right or entitlement to use or access the bridge spanning Turkey Creek. In the late summer of 2004,

Respondent had the bridge spanning Turkey Creek torn down due to concerns about safety and structural integrity.

In October, 2004, Petitioners filed their petition in the Circuit Court of Monroe County, West Virginia, seeking to enjoin Respondent from blocking Petitioners' access across the Turkey Creek bridge and seeking an order from the Circuit Court directing Respondent to rebuild the torn down bridge. Following discovery, including the depositions of the parties, Petitioners filed their *Motion for Summary Judgment* seeking the relief requested in their initial petition. Thereafter, Respondent filed her own *Motion for Summary Judgment* and a separate *Memorandum of Law Contra to Petitioners/Plaintiffs' Motion for Summary Judgment and in Support of Respondent/Defendant's Motion for Summary Judgment*. Respondent's Motion and Memorandum of Law asserted that Petitioners had failed, as a matter of law, to present any evidence showing that they were entitled to the relief requested. More specifically, Petitioners' proffered evidence of an express easement, in the form of hand written receipts, failed to contain descriptions of the alleged easement sufficient to satisfy the Statute of Frauds. Further, Petitioners' own testimony confirmed that they had not established an easement by prescription in that they had not used the alleged easement for the statutory ten year period and their use was not adverse to Respondent's predecessor in title.

On July 18, 2005<sup>1</sup>, a hearing was held on the above Motions. Petitioners withdrew their Motion for Summary Judgment and the Circuit Court heard argument on Respondent's Motion for Summary Judgment. Thereafter, on August 26, 2005, the Circuit Court entered its Order Granting Defendant's Motion for Summary Judgment from which Petitioners appeal.

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<sup>1</sup>Although Petitioners state in their Brief that the hearing was held on August 23, 2005, the Circuit Court's Order clearly indicates said hearing was held on July 18, 2005.

### III. ARGUMENT

#### The Circuit Court Did Not Err in Granting Respondent's Motion for Summary Judgment.

Petitioners assign only one error to the Circuit Court, that being that it was error to grant Respondent's Motion for Summary Judgment in that clear issues of material fact existed which precluded summary judgment. Specifically, Petitioners assert that Circuit Court erred in finding that there was no express easement and that the Circuit Court erred in finding that there was no easement by prescription. Although Petitioners assert that the Circuit Court based its ruling on disputed issues of fact, a clear reading of the Circuit Court's Order establishes that the Circuit Court's ruling was based on well settled issues of law, and that summary judgment was entirely appropriate.

#### A. The Circuit Court did not err in finding that there was no express easement.

Petitioners assert that they presented evidence, in the form of hand written receipts dated "7-25-93," "6-18-94," and "8-14-94", which, at the very least, create issues of material fact sufficient to submit the issue of the existence of an express easement to a jury. However, as the Circuit Court acknowledged, the hand written receipts relied upon by Petitioners fail to establish the existence of an essential element to Petitioners' case. More specifically, said receipts do not contain an adequate description of the alleged easement. Therefore, summary judgment against Petitioners on the issue of an express easement was proper.

It is well settled that any interest in land can only be conveyed by a proper will or deed. There can be no deed without writing. *Parsons v. Baltimore Bldg. & Loan Assn.*, 44 W. Va. 335, (1898). In order for a deed to be valid it must contain the description of the property conveyed. *Webb v. Ritter*, 60 W. Va. 193, (1906); see *Parsons & Sweeney Oil Co. v. McCormick*, 68 W. Va. 604 (1911) (a deed of conveyance, whatever its character, must have legal certainty as to the property

conveyed). Moreover, in order to satisfy the statute of frauds, a memorandum of conveyance must contain every essential term of the agreement except the consideration. *Harper v. Pauley*, 139 W. Va. 17 (1953); see West Virginia Code § 36-1-3. With regard to easements, West Virginia Code § 36-3-5(a) specifically requires that any deed that

grants or reserves an easement or right-of-way shall describe the easement or right-of-way by metes and bounds, or by specification of the centerline of the easement or right-of-way, or by station and offset, or by reference to an attached drawing or plat which may not require a survey, or instrument based on the use of the global positioning system which may not require a survey.

Petitioners claim the existence of an express easement based on three receipts, dated "7-25-93," "6-18-94," and "8-14-94." The receipt dated "7-25-93" was signed by Joe Brown, the husband of Respondent's predecessor in title, and the other two receipts were signed by Georgia Brown, Respondent's predecessor in title. Petitioners proffer, for the first time on appeal, an alleged unexecuted, unrecorded, "Easement Agreement" which Petitioners assert would have been presented at trial as proof of an express easement. Each of these writings fails to establish an express easement.

As an initial matter, it should be noted that all three receipts presented by Petitioners specifically reference Petitioner Harold Wolfe, but fail to reference Petitioner Luther Ellison. In fact, Petitioner Ellison has failed to produce any writing whatsoever in support of his claim for an express easement. Such lack of documentary evidence on behalf of Petitioner Ellison was recognized by the Circuit Court in its August 26, 2005, Order. Specifically, the Court found, in its finding of fact No. 7 that "Plaintiff Ellison has not produced any receipts or other writings to evidence his interest in the bridge or an alleged easement in the bridge." Petitioners have not appealed the Circuit Court's finding of fact with regard to Petitioner Ellison's express easement claim. Therefore, Petitioners

cannot now assert that Petitioner Ellison has an express interest in the alleged easement.

Additionally, the "Easement Agreement" now being presented by Petitioners as a basis for their express easement claim is not of record in these proceedings. Said "Easement Agreement" was never proffered as evidence below; it was not referenced in Petitioners' pleadings, nor was it mentioned in Petitioners' depositions. Moreover, said "Easement Agreement" was not referenced either in support of Petitioners' Motion for Summary Judgment or in response to Respondent's Motion for Summary Judgment. As Petitioners' arguments regarding the "Easement Agreement" are being raised for the first time on Appeal, said arguments are not properly before the Court and should be disregarded. See Whitlow v. Board of Education, 190 W. Va. 223, 226, 438 S.E.2d 15 (1993) ("when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal), citations omitted. Even if the "Easement Agreement" had been proffered below, it would fail as evidence of an express agreement as it was never signed. Furthermore, there is no proof that said document was ever presented to, or acquiesced in, by Respondent's predecessor in title.

None of the writings offered by Petitioners as evidence of an express agreement contains a description of the alleged easement sufficient to satisfy the statute of frauds. To the extent that Petitioners argue that the receipt allegedly signed by Joe Brown dated July 25, 1993, contains a sufficient description of the alleged express easement in that it mentions a bridge across Turkey Creek, said receipt fails as a deed of conveyance as it is undisputed that Joe Brown had no interest in the subject property and did not have a power of attorney or appointment to act on Georgia Brown's behalf. See West Virginia Code § 36-1-3 (requiring that in order to satisfy the statute of frauds the writing must be signed by the party to be charged.) Furthermore, the July 25, 1993 receipt



fails to mention an easement at all.

Additionally, it is impossible to discern from any of the presented receipts the location or extent of the alleged easement. The receipt dated "6-18-94" and "8-14-94" which were signed by Georgia Brown, Respondent's predecessor in title, mention only an "easement" without providing any indication of the location or size of said "easement." Moreover, neither of these receipts contain any reference to the bridge in question. Furthermore, said receipts do not provide the "means or key by which the description may be made certain." See Harper at 23.

Petitioners assert that the Circuit Court and Respondent's reliance upon Harper is misplaced. Petitioners assert that "the written receipts which identify the interest that was created (easement) and the location (bridge), satisfy all of the essential elements necessary to enforce the agreement of the parties." See Petitioner's Brief at 7. Harper stands for the proposition that the writing must provide "a description which is itself definite and certain or it must furnish the means or key by which the description may be made certain and identified with its location on the ground." Harper at 22. In Harper, the Court went on to state:

In other words the contract, note, or memorandum is insufficient where parol evidence is necessary to supply the description, or part thereof, to determine and define the subject matter, and to show the intention and agreement of the parties as to the subject matter; and it is sufficient as regards subject matter where it furnishes a sufficient foundation for the admission of extrinsic evidence to apply the description and by means of such evidence the particular tract of land which is the subject matter of the agreement may be identified and located to the exclusion of all others. . . Notice the special significance of the phrases 'means or key by which the description may be made certain' and 'sufficient foundation for the admission of extrinsic evidence', and that the 'means or key' and the 'foundation' must be contained in the contract itself.

Id. None of the receipts presented by Petitioners contain the "means or key" by which the description of the alleged easement may be made certain, nor do the receipts provide the

“foundation” for the admission of extrinsic evidence necessary to ascertain said description.

As Petitioners failed to produce sufficient evidence to establish the existence of an essential element to Petitioners’ case, specifically a valid writing containing the essential elements of the alleged conveyance, Petitioners’ claim that they have an express easement to use the bridge spanning Turkey Creek must fail. Therefore, the Circuit Court was correct in finding, as a matter of law, that Respondent was entitled to summary judgment on Petitioners’ claim of an express easement.

**B. The Circuit Court did not err in finding that there was no prescriptive easement.**

Petitioners assert that the Circuit Court erred in finding that there was no prescriptive easement based on the undisputed testimony of Petitioner Wolfe which established that Petitioners’ use of the alleged easement was for less than the statutory period of ten years.

In order to establish a prescriptive easement, Petitioners must be able to prove, by clear and convincing evidence, “[c]ontinued and uninterrupted use or enjoyment for at least ten years, identity of the thing enjoyed and claim of right adverse to the owner of the land known to and acquiesced in by him, but if use is by permission of the owner, easement is not created by such use.” Syllabus Pt. 1, Hanshaw v. Zickafoose, 173 W. Va. 151, (1984); see Syllabus Point 3, Norman v. Belcher, 180 W. Va. 581, (1989).

As recognized by the Circuit Court, Petitioners’ claim to a prescriptive easement encompassing the bridge across Turkey Creek, must fail as a result of the undisputed testimony of Petitioner Wolfe. In his deposition, Petitioner Wolfe, testified that to the best of his memory, the bridge in question was built and opened in late 1994. Specifically, Petitioner Wolfe testified as follows:

Q: But you have no current recollection of when you actually started using that bridge.

Is that right?  
A: Other than what the receipts indicate, that it would have been the latter part of 1994.  
Q: Okay. The latter part, you believe it would have been --  
A: After the latest date here.  
Q: 8-14?  
A: Uh-huh, (yes).  
Q: So it could have been as late as November?  
A: Could have been.

See Deposition of Harold B. Wolfe, attached hereto as Appendix A, at Page 29:18-23 - Page 30: 1-7.

It is undisputed that the bridge was torn down in the summer of 2004. Therefore, based on Petitioner Wolfe's testimony, it is clear that the statutory ten year period to establish a prescriptive easement was not met in this matter. As such, Petitioners' prescriptive easement claim must fail. The Circuit Court was correct in entering summary judgment against Petitioner on their prescriptive easement claim.

Petitioners now assert, "the memory of Harold Wolfe notwithstanding," that the actual date of construction and use of the bridge is an issue of material fact which precludes summary judgment. Petitioners again rely on the previously mentioned unsigned and unrecorded "Easement Agreement" which was dated December of 1993 as evidence that the bridge was constructed in 1993, thereby providing Petitioners with the requisite ten year period. As noted above, said "Easement Agreement" was not proffered as evidence below and is not of record in the instant Petition, therefore any arguments based on said "Easement Agreement" must be ignored. See Whitlow v. Board of Education, *supra*.

#### **IV. CONCLUSION**

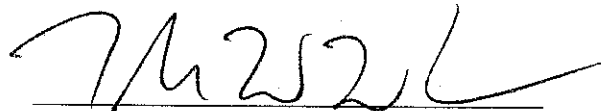
The Circuit Court of Monroe County did not err in granting Respondent's Motion for Summary Judgment as Petitioners are unable to establish the existence of elements essential to their

claims of express easement and prescriptive easement.

BASED ON THE FOREGOING, Respondent, Vips Alpizar, respectfully requests that this Court deny Petitioners' Petition for Appeal from the August 26, 2005 Order of the Circuit Court of Monroe County, West Virginia. Respondent further requests that she be awarded attorney fees and the costs of this action, and such other and further relief as this Court deems just and fit.

Respectfully submitted,

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Defendant/Respondent  
By Counsel,



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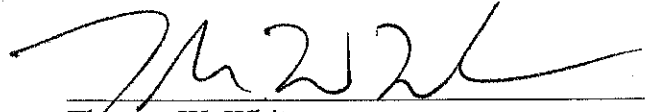
### CERTIFICATE OF SERVICE

I, Thomas W. White, Barry L. Bruce & Associates, L. C., Counsel for Defendant/Respondent, Vips Alpizar, certify that I have on this date served a true and correct copy of the foregoing **DEFENDANT/RESPONDENT'S REPLY BRIEF**, via facsimile and U.S. Mail, first-class, postage prepaid, upon the following:

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this the 20<sup>th</sup> day of July, 2006.

  
Thomas W. White